Supreme Court, U.S.
FILED

No. 931240 DEC 22 1993

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent,

V.

CLARENCE BRITT,

Petitioner.

On Petition For Writ Of Certiorari From The
United States Court of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

1. DID THE TRIAL COURT ERR IN DENYING PETITIONER'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM PETITIONER'S RESIDENCE PURSUANT TO A SEARCH WARRANT ISSUED BY A VIRGINIA STATE MAGISTRATE?

2. DID THE TRIAL COURT ERR IN REFUSING TO EXCLUDE EVIDENCE, SEIZED FROM PETITIONER'S RESIDENCE, FROM THE JURY'S CONSIDERATION BECAUSE OF THE PREJUDICIAL EFFECT AND DENIAL OF DUE PROCESS TO PETITIONER AS A RESULT OF THE INTRODUCTION OF SUCH EVIDENCE?

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Decision of
The United States Court of Appeals
For the Fourth Circuit

This matter was argued before the United States Court of Appeals for the Fourth Circuit on March 3, 1992, and was decided.

The case was decided on April 7, 1992 in an unpublished opinion under Docket No. 91-5024. The court affirmed petitioner's conviction for attempt to possess cocaine with intent to distribute in violation of 21 U.S.C., Section 846 in a per curiam opinion decided April 7, 1992. (App. 1)

Jurisdictional Statement

Jurisdiction of this court is invoked pursuant to the Fourth and Fifth Amendments to the Constitution of the United States. It is a Petition for Certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit decided April 7, 1992 under Docket No. 91-5024 in a matter styled United States of America, Plaintiff-Appellee v. Clarence Britt, Defendant-Appellant.

On motion of petitioner, the mandate from the United States Court of Appeals for the Fourth Circuit was reissued effective September 23, 1993. (App. 3) The effect of the reissuance of the mandate was to grant petitioner the opportunity to pursue a Petition for Writ of Certiorari with this court.

Constitutional and Statutory Authorities Conferring Jurisdiction Upon This Court

FOURTH AMENDEMENT TO THE UNITED STATES CONSTITUTION - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense

to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 U.S.C., SECTION 846. ATTEMPT AND CONSPIRACY - Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

RULE 403. FEDERAL RULES OF EVIDENCE - Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considera-

tions or undue delay, waste of time, or needless presentation of cumulative evidence.

Statement of the Case

In mid-June, 1990, Alberto Jimenez, a three-time committed felon, became a cooperating government informant. In the course of his cooperation with the government, Jimenez advised law enforcement agents that he had a connection with an individual in Virginia, who purchased large quantities of cocaine. He indicated that their dealings began with marijuana and subsequently progressed to cccaine.

Jimenez agreed to make contact with his Virginia contact, who allegedly was Clarence Britt. According to Jimenez, he and Britt met on some four or five occasions before the instant transaction was proposed.

Jimenez began his cooperation with the government upon his attorney's advice. Agent Grimes, of the DEA was the first law

enforcement officer to contact Jimenez, and it was through Grimes that several telephone contacts between Jimenez and Britt were initiated.

With the consent of Jimenez, the telephone conversations between himself and Britt were taped. During the course of the telephonic communications, quantities of approximately 10 kilos, at $20,000 per kilo, were discussed.

Michael Grimes, Special Agent of the Drug Enforcement Administration, confirmed that counsel for Jimenez initially contacted him for the purpose of providing information, which would be of benefit to his client, Jimenez. Jimenez provided him with a telephone number, (804) 826-2241 or 2281.

Grimes testified that he became familiar with petitioner's voice during the course of the taping of the telephone conversations between Jimenez and Britt.

Pursuant to the telephone communications between Britt and Jimenez, a meeting was set up at the Elberta Motel in Wilmington, North Carolina. The area was placed under surveillance by DEA agents and law enforcement officers of the New Hanover Sheriff's Department. Through Jimenez, Grimes met petitioner at the appointed rendezvous. According to Grimes, petitioner appeared to be nervous, and indicated that he could not handle more than 10 or 11 kilograms of cocaine. When the two broke off their conversation at the motel, Britt indicated he was going to get the money to consummate the transaction. Jimenez and Grimes agreed, in their testimony, that no narcotics or money were produced at the motel.

As Britt left the motel, several surveillance units assumed positions to monitor Britt's movements, in anticipation that he would pick up the drug-buy money

and return to the motel. They followed for a period of time, as Britt and his son drove back and forth in various directions through the City of Wilmington. Ultimately, the decision was made to stop the vehicle and make the arrests. At the time of the stop, the Britt vehicle was not proceeding in a direction which would have carried it back to the Elberta Motel.

When the vehicle was stopped, Agents Duber and Johnson conducted a search thereof, after receiving consent to search from the owner, Victor Britt. Inside the trunk of the vehicle, the agents discovered a bag of United States currency in the amount of $206,480 and a 357 magnum pistol. Also discovered in the vehicle was a small quantity of cocaine, but petitioner was not charged with possession of same. When the money was discovered, Agent Duber inquired as to the ownership of the money, and Victor Britt responded that it was

his. When questioned by Agent Martin, petitioner denied any knowledge or participation in a drug transaction.

Agent Michael Kennedy, of the DEA assigned to Norfolk, Virginia, testified that a search warrant was issued by a Hampton, Virginia Magistrate, for the search of the petitioner's residence. The affidavit for the warrant was prepared by C. E. Firth of the Hampton, Virginia police department, based upon information provided Agent Grimes. Pursuant to that search, which was initiated for the purpose of recovering records of drug dealing, a large sum of United States currency, as well as tax records and other documents were recovered.

Petitioner offered no testimony or evidence in defense against the two count indictment.

Argument

I. **THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM HIS HAMPTON, VIRGINIA RESIDENCE, BECAUSE THE SEARCH WARRANT, ISSUED FOR SUCH PREMISES, VIOLATED THE REQUIREMENTS OF RULE 41(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.**

In relevant part, Rule 41(a) provides:

> "A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government."

The search warrant used for the search of petitioner's residence in Hampton, Virginia, failed to meet the requirements of Rule 41(a) in several respects.

First, the search warrant was issued by State Magistrate Phillip Spratt. The government conceded that a Virginia State Magistrate would be roughly the same as a North Carolina State Magistrate and would

not qualify as such as a judge of a court of record, as required by Rule 41.

Second, the warrant was not issued upon the request of a federal law enforcement officer or an attorney for the government. The affiant, whose name appears on the affidavit for the search warrant and the warrant, C. E. Firth, was, at the time of the preparation of the affidavit, a Hampton, Virginia detective. He also served as a member of a joint state-federal task force, but swore his oath as a Virginia police officer. Thus, for purposes of Rule 41, he was not a federal officer, authorized to make a request for a search warrant.

A search arising out of an investigation into a bank robbery, which was concurrently a state and federal crime and where there was a joint undertaking between state authorities and the FBI from the inception, Rule 41 requirements had to

be maintained and followed by the federal officers in the issuance of the warrant. United States v. Searp, 586 F.2d 1117 (1978, 6th Cir.). Again, it was held that Rule 41 provisions must be satisfied, where a warrant is issued by a state judge, on a state form, on application by state narcotics agent for a search initiated by federal agents, in which state agents participated. United States v. Rios, 611 F.2d 1335 (1979, 10th Cir.).

Finally, a search was federal in nature and must comply with Rule 41, where it was not seriously disputed that a DEA agent played the central role in the search. United States v. Melotte, 95 F.R.D. 380 (1982). See also, United States v. Hall, 678 F. Supp. 1172 (1988), where DEA agent's participation in the search procedures violated Rule 41, resulting in a suppression of evidence seized.

If, however, this court were to determine that Rule 41 violations in the instant case should not invalidate the search of petitioner's residence, and that the search should be reviewed under the standards of Virginia State law, petitioner submits that the search is likewise invalid for failure to follow the requirements of Virginia statutory law, as well as the Virginia Constitution.

In United States v. Benford, 457 F. Supp. 589 (1978), the court held that the thrust of inquiry and investigations involving federal-state cooperation should be directed to whether either federal or state officers violated the Constitution in the course of the search. If the warrant is applied for and obtained by state officers, any special state rules pertaining to its execution should apply insofar as they are not contrary to the United States Constitution. Again, in

United States v. McKeever, 905 F.2d 829 (1990, 5th Cir.), the court held that Rule 41 only applies to warrants issued upon request of federal law enforcement officers or attorneys for the government. None of the rule's requirements apply to state warrants. Under such circumstances, the search involved here should be viewed, first, under the provisions of applicable state law.

Section 19.2-52 of the Code of Virginia, 1950 as amended, provides:

> "No search warrant shall be issued until there is filed with the officer authorized to issue the same an affidavit of some person reasonably describing the place, thing, or person to be searched, the things or persons to be searched for thereunder, alleging briefly material facts, constituting the probable cause for the issuance of such warrant and alleging substantially the offense in relation to which such search is to be made and that the object, thing, or person searched for constitutes evidence of the commission of such offense. Such affidavit shall be certified by the officer who issues such warrant and delivered by such officer or other officer authorized to certify such

warrants to the clerk of the circuit court of the county or city wherein the search is made within seven days after the issuance of such warrant and shall by such clerk be preserved as a record and shall at all times be subject to inspection by the public; however such affidavit may be temporarily sealed by the appropriate court upon application of the attorney for the Commonwealth for good cause shown in an ex parte hearing. Any individual arrested and claiming to be aggrieved by such search and seizure or any person who claims to be entitled to lawful possession of such property seized may move the appropriate court for the unsealing of such affidavit, and the burden of proof with respect to continued sealing shall be upon the Commonwealth. Each such clerk shall maintain an index of all such affidavits filed in his office in order to facilitate inspection. No such warrant shall be issued on an affidavit omitting such essentials, and no general warrant for the search of a house, place, compartment, vehicle or baggage shall be issued. The term "affidavit" as used in this section, means statements made under oath or affirmation and preserved verbatim.

Failure of the officer issuing such warrant to file the required required affidavit shall not invalidate any search made under the warrant unless such failure shall continue for a period of thirty days. If the affidavit is filed prior to the expiration of the thirty-day period, never-

theless, evidence obtained in any such search shall not be admissible until a reasonable time after the filing of the required affidavit."

Article I, Section 10 of the Constitution of Virginia provides:

> "That general warrants, whereby an officer or messenger may be commanded to search suspected placed without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

Petitioner submits that the search of his residence would not be valid under applicable state law because the material facts alleging to constitute probable cause in the affidavit are woefully lacking in substance, specificity and authenticity of a sufficient nature to cause a neutral and detached magistrate to form a reasonable belief that the items to be searched for and seized would, indeed, be present at petitioner's residence. The affidavit prepared by Detective Firth pro-

vided that "based on Special Agent Grimes' experience, and the combined experience of this affiant and other agents working on this investigation, this affiant has reason to believe that the premises located at 2307 North Amistead Avenue is a communicating and record keeping location, and a base of operations for this major cocaine distributing organization. And, based on the experience of agents investigating this case, a drug dealing organization of this magnitude will have to keep records of its sales, accounts receivable, telephone numbers of other drug dealers, and other records related to the distribution of cocaine."

Nothing contained in the body of the affidavit would cause a person to conclude that the records sought in the investigation would necessarily be on premises. No informant, agent or individual indicated that the items described in the affidavit

would actually be at petitioner's residence. The concluding paragraph of the affidavit is nothing more than surmise or conjecture regarding the existence of records, much less their location.

In Anderson v. United States, 851 F.2d 727 (1988, 4th Cir.), the court held that the nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where individuals would likely keep such items. Notwithstanding the holding in Anderson, petitioner submits that there must be some reasonable basis to conclude that the evidence to be seized would, in fact, be on premises. The exchange between trial counsel in court clearly indicated that there had been no investigation of petitioner, his business associations, his habits or his haunts. Although the results of the search proved to be quite

fruitful, a search cannot be justified upon the results thereof.

There is no bright line rule with regard to the existence or non-existence of probable cause. However, Virginia law is quite clear that there must be a reasonably close nexus in time between the items to be searched for and the information constituting probable cause at the time of the execution of the search. Huff v. Commonwealth, 213 Va. 710, 194 S.E.2nd 690 (1973). In the instant case, there is absolutely no reference to when the records might reasonably be expected to be on premises, because there was no information indicating whether such records existed, in fact, as previously suggested.

In Wiles v. Commonwealth, 209 Va. 282, 163 S.E.2nd 595 (1968), the court held that an affidavit was insufficient to support a subsequent search, where same merely recited that the defendant was in

possession of narcotics. No supporting information for such conclusion was provided, and the Court found it appropriate to invalid the search warrant. As in the instant case, there are no facts with which one may conclude that the items to be seized pursuant to the warrant were, indeed, on premises.

Article I, Section 10 of the Constitution of Virginia requires the existence of "facts committed" in order to justify a search. Because of the lack of specificity providing a reasoned basis to conclude that the evidence sought was on premises, petitioner submits that the search warrant in the instant case constitutes a general warrant in contravention of Article I, Section 10 of the Constitution of Virginia.

II. **THE TRIAL COURT ERRED IN ADMITTING EVIDENCE ACQUIRED IN THE SEARCH OF PETITIONER'S VIRGINIA RESIDENCE IN CONTRAVENTION OF RULE 403 OF THE FEDERAL RULES OF EVIDENCE.**

Petitioner assigns error to the court's ruling admitting evidence seized from his Virginia residence pursuant to the search warrant. The introduction of such evidence was obviously prejudicial, in that a jury hearing the case could only infer guilt from the discovery of a large sum of United States currency and a significant cache of drugs in the form of marijuana. Additionally, the large number of weapons and other papers seized would tend to occasion, even in the most unbiased mind, a strong inclination toward guilt.

Rule 403, of necessity, is a rule of practicality and fairness. The trial court, evidently, was of the view that the probative value of the evidence outweighed its obvious prejudicial effect. In the face of the other evidence tending to

suggest that there was no substantial act toward the consummation of the narcotics transaction, such evidence, as was introduced from the search of the petitioner's residence, would tend to buttress an otherwise weak or unsubstantiated case.

Petitioner would admit that it may be difficult during the course of a trial to make fine distinctions, but, upon appellate review, this court, with a review of the full record, can make an informed judgment regarding the appropriateness of the trial court's decision in this regard.

Certificate of Service

I hereby certify that on the 21st day of January, 1994, J. Douglas McCullough, Esquire, United States Attorney, 310 New Bern Avenue, Federal Building, Suite 800, Raleigh, NC 27601-1461.

William P. Robinson, Jr.

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CLARENCE BRITT,
Defendant-Appellant.

No. 91-5024

Appeal from the United States District Court
for the Eastern District of North Carolina, at Wilmington.
W. Earl Britt, District Judge.
(CA-90-26-2)

Argued: March 3, 1992

Decided: April 7, 1992

Before WIDENER and HALL, Circuit Judges, and MACKENZIE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: William P. Robinson, Jr., ROBINSON, ZALESKI, WOOLARD & LINDSEY, Norfolk, Virginia, for Appellant. Jonathon Scott Shapiro, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Margaret Person Currin, United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Appellant Clarence Britt appeals his conviction for attempted possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 846. He seeks suppression of the evidence obtained pursuant to a warrant to search his home because of the absence of probable cause and because the warrant was allegedly issued in violation of Fed. R. Crim. P. 41(a). Additionally, he claims that the probative value of the evidence seized was substantially outweighed by the danger of unfair prejudice. Finally, he challenges the sufficiency of the evidence used to convict him.

Appellant argues that there was no probable cause to search his home because there was no reason to believe that records of drug transactions would be kept at his home. The law requires a nexus to exist between the evidence sought and the place to be searched, but this nexus may be established by reasonable inferences about where one would likely keep such evidence. *United States v. Anderson*, 851 F.2d 727, 729 (4th Cir. 1988). The officers and issuing magistrate reasonably concluded that records of Britt's drug transactions would be kept in his home and that probable cause for the issuance of the warrant existed. In addition, because the officers relied on the warrant's validity in good faith, suppression is unwarranted. *See United States v. Leon*, 468 U.S. 897 (1984).

Britt also claims that the extensive involvement of federal officers in this joint state and federal task force which conducted the investigation and arrest transformed the search into a federal search requiring compliance with Fed. R. Crim. P. 41(a) which mandates that federal search warrants be issued by federal magistrates or judges of state courts of record. In this case, a Virginia magistrate, concededly

not a judge of a court of record, issued the warrant. Even if the degree of federal involvement, which has not been shown, might denominate this a federal search requiring compliance with Fed. R. Crim. P. 41(a), nevertheless, a technical breach of Rule 41, without more, does not mandate suppression of evidence. In the absence of a constitutional violation, suppression is not automatic. Here no bad faith police conduct arose in connection with the issuance of the warrant, and no prejudice to the defendant has occurred in the sense that the search would not have ensued but for the procedural mishap. We find no justification for the suppression of evidence. *See, e.g., United States v. Searp*, 586 F.2d 1117 (6th Cir. 1978); *United States v. Burke*, 517 F.2d 377 (2d Cir. 1975); *United States v. Hall*, 505 F.2d 961 (3d Cir. 1974). Appellant has not shown that the search violated fourth amendment principles; we have already held that probable cause existed to search appellant's home, and no other constitutional challenges have been made. For these reasons, the exclusion of evidence would be inappropriate.

Appellant cites as clearly erroneous the court's decision that the probative value of the evidence seized was not substantially outweighed by the danger of unfair prejudice. Appellant's intent to consummate this large drug deal was relevant to the crime of attempt; the enormous quantities of cash and marijuana, as well as the seven firearms found in Britt's home, were relevant to appellant's intent. The action of the district judge in admitting the evidence seized in the search was not clearly erroneous.

Finally, appellant challenges the sufficiency of the evidence to support his conviction. This court must view the evidence in the light most favorable to the government. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The government was required to show that Britt intended to complete the transaction and had already taken a substantial step toward its completion. *See United States v. Pelton*, 835 F.2d 1067, 1074 (4th Cir. 1987), *cert. denied*, 486 U.S. 1010 (1988). A government informant testified to several prior drug transactions with appellant. Appellant met with DEA agent Grimes and with the informant and agreed to purchase eleven kilograms of cocaine; testimony and taped conversations highlighted the details of the deal. At the time of his arrest, appellant possessed over $200,000.00 in cash. The fruits of the search of appellant's home provided evidence of appellant's intent

to complete the drug transaction. There was ample evidence upon which to base the conviction.

The judgment of the district court is accordingly

AFFIRMED.

FILED: September 23, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-5024

UNITED STATES OF AMERICA,

versus Plaintiff-Appellee,

CLARENCE BRITT,

Defendant-Appellant.

ORDER

We are advised by Britt's attorney that due to the fact that Britt was not fully advised of his appellate rights, the time for filing a petition for certiorari to the Supreme Court has passed due to no fault of Britt's.

Being of opinion that Britt should be permitted to file his petition for certiorari, it is accordingly ADJUDGED and ORDERED that our decision in this case, filed April 7, 1992, shall be, and the same hereby is, vacated, and our mandate therein shall be, and it hereby is, recalled.

It is FURTHER ADJUDGED and ORDERED that our said decision in this case, filed April 7, 1992, shall be, and the same hereby is, reissued and refiled en haec verba with our said decision of April 7, 1992.

It is FURTHER ADJUDGED and ORDERED that our mandate will issue forthwith on our decision filed this date by virtue of this order.

The end and effect of this order is that it will permit Britt to file his petition for certiorari. See Wilkins v. United States, 441 U. S. 468.

With the concurrences of Judge Hall and Judge MacKenzie.

/s/ H. E. Widener, Jr.

For the Court